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JOHN MARSHALL

AN ADDRESS

DELIVERED UPON THE

INVITATION OF THE AMERICAN BAR ASSOCIATION
AND A JOINT COMMITTEE OF CONGRESS

IN THE

HALL OF THE HOUSE OF REPRESENTATIVES

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BY

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MR. CHIEF JUSTICE,

MEMBERS OF THE AMERICAN BAR ASSOCIATION,

LADIES AND GENTLEMEN :

Today is dedicated to the law. I therefore speak to you as a lawyer; and I congratulate you that it is part of our happy fortune that the occasion which brings us together offers in itself its amplest and completest justification. It would indeed have been a grave dereliction of duty if the brotherhood of American lawyers, on the bench and at the bar, had not assembled to honor with fitting observances the centennial anniversary of the entrance by John Marshall into the office of Chief Justice of the United States.

And the place where we are assembled is of all places the most fitting for these ceremonies; for it was here, in the capital of the country he loved so devotedly and served so faithfully, that he was attended by those patient and achieving years during which his labors enrolled his name among the few immortal benefactors of mankind. It is also eminently fitting that such an occasion should be honored by the presence of the Chief Magistrate and the members of the Cabinet, whose subjection to the law was determined by him; by the presence of members of that illustrious tribunal the vast extent of whose rightful jurisdiction was determined by him; by the presence of distinguished Senators and Representatives, representing in Congress the States whose proper and abiding place in our governmental

system was determined by him; and by the presence of citizens of the country which under his forming hand, instead of becoming a dissoluble confederacy of discordant States, became a great and indissoluble nation, endowed with all the powers necessary to enable it not only to protect itself against enemies at home or abroad, but also to accept and discharge the splendid and ennobling mission which had been confided to it in the divine purpose for the education of the world, and which he recognized when first of all men he spoke of the Empire of America—that of securing to the whole American continent “government of the people, by the people, and for the people.”

The small Virginia hamlet in which John Marshall was born on the twenty-fourth day of September, 1755, is almost within sight from the noble terrace of the Capitol, and much as the world has changed, that section of Virginia has not very greatly changed since that day. His birth fell almost half way between the opening of the seventeenth century and the opening of the twentieth—midway of the three centuries which, in many important respects, of all the centuries, have been the most fruitful, the most interesting, and the most beneficent.

The first half of that stirring period of

“Change, alarm, surprise,”

witnessed what is probably the most far-reaching and certainly the most romantic drama of history—the colonization of America. The landing at Jamestown had followed the dawn of the seventeenth century by only seven years, and the Pilgrims having landed in Massachusetts in 1620

and William Penn having landed in Pennsylvania in 1683, it is reasonably accurate to consider that the essential and formative labors of the first settlers extended over and were comprised within the hundred and fifty years preceding John Marshall's birth, and that a like period of a hundred and fifty years extends from his birth to the day on which we are assembled to do honor to his memory.

I know not how others may feel, but I have never been able to read a single page of the marvelous story of the settlement of America without an access of generous enthusiasm, and of seeming to be lifted into a purer and serener air. The men engaged in those transforming labors were fully conscious of the greatness of the work given them to do; and they addressed themselves to it as co-workers with God for the advantage, not only of themselves and their children, but of the future generations which were to rise up and call them blessed, as age after age entered upon its inheritance of the free institutions prepared for it, by the unceasing toil and the unwitnessed sacrifice, by the lonely vigil and the drear winter, by the fear of sudden massacre and the absence from all accustomed joys, by the unshed tears and by the shed blood of the first comers to these shores.

It is too often forgotten that we are in almost all essential things only their lawful heirs, and such will be our children's children to the last syllable of recorded time. We sometimes talk with dull misapprehension of our inheritance, as if the mingling here of the different nationalities of the earth was a mere accident of our own time, and as if because some of our misfortunes are traceable to it, we are privileged to deny to any less fortunate brother such oppor-

tunity to seek a home upon this free and bountiful continent as our ancestors enjoyed. The truth is that the citizenship to which John Marshall was born, with all its far-reaching opportunities and inspirations, was due to just such mingling of the blood of different races as we are now witnessing. A Jesuit father is authority for the statement that eighteen different languages were spoken in what is now the city of New York two centuries ago, and probably no greater number is spoken there today; while as early as 1761 it was declared by a very competent authority that "the diversity of peoples, religions, nations, and languages in America is prodigious." Certainly the Dutch, the English, the French, the Germans, the Scotch, and the Swedes, Protestants and Catholics, were all self-asserting and aggressive agencies in the era of our colonization; and each stock and each creed made contributions of the greatest possible value to the foundations of the enduring structure of our nationality. Let us, therefore, always have the faith to believe that America is the heritage, not of ourselves alone, but of mankind, destined as well as fitted to receive all who come to her, and able to ameliorate their distresses, to diminish their differences, to cultivate their self-respect, and to fuse them, in the processes of the uncounted years, into one great and free and happy people.

This vast continent of America is also charged and will, I believe, always remain charged with another mission, impressed upon it by the men who settled it—that of being the refuge and the home of a true equality and of the republican form of government. It was settled and civilized and defended by men to whom the idea of privilege was abhorrent, and to whom the sense of substantial equality of

opportunity was as the very breath of their lives. If in the changing circumstances of times and seasons any of the inequalities or privileges of the old world, from which they fled to the solitude of unbroken forests and the perils of savage foes, should unhappily reappear in the new world they founded, I beg you to believe they will not long find shelter here; for this entire continent has been, in counsels wiser than ours and which we could not hope to withstand if we wished, irrevocably dedicated to the common brotherhood of man in its truest and broadest sense. M. de Tocqueville long ago rightly described the controlling spirit of the youthful nation when he declared that it was "a manly and legitimate passion for equality." That noble passion is one of the most ancient and most constant forces in civilization, and it is necessarily the inexorable foe of inequality and of privilege in all their forms. It has often been checked, often thwarted, often even defeated and overthrown; but it has had, in the end, resistless power; and it has always advanced to new and more extensive conquests. Its last and greatest conquest is the continent on which we live.

To properly estimate the true grandeur of character of any great man it is always necessary to understand his environment and the spirit of the age in which he lived. The vibrant and electric atmosphere, into which John Marshall was born and in which his youth was passed, was the inevitable consequence of the memories which the colonists had brought with them from the old world to the new, and of the elevating experiences of the life of adventure, of courage, of intellectual and religious fervor which they had lived. "Not many noble, not many

mighty," were enrolled in their ranks. They were people of the middle class, such as we all have continued to be and, however reluctant some of us may be to admit it, we all are likely to remain. They did not primarily seek wealth, but they avoided poverty and acquired property by hard and honest toil. They came indeed "out of great tribulation," but often also out of great joy and buoyancy of spirit; and the fruits of their experiences were visible in their daily lives, illuminated as those lives were by that sublime spirit of sacrifice for conscience sake, which in so many of their old homes had "wrought righteousness" for them and "out of weakness had made them strong."

The men who came from Sweden, from Holland, from England, from France, and from Germany, differing in many respects—in language, in habits, in dress, in manners—were agreed, as if of one blood and one creed, in the underlying principles of the Reformation, for which they and their fathers had suffered unspeakable afflictions; and they were agreed also in their common hatred of all tyranny, whether of church or king. They were an advance guard of a political Renaissance sent to take possession of the new world and to plant here that tree of liberty whose leaves should be "for the healing of the nations."

And as these different nationalities were commingled and were rapidly being fused into one people, the professors of all the different religious creeds gathered here were united in their devotion to the land which gave to each of them the right to freedom of religious worship; and when John Marshall was born the American colonists, thinly scattered along the Atlantic coast from Massachusetts Bay to Georgia,

were as one people slowly marching inland to take possession of the continent, and to establish a great nation resting upon the sublime truth—true yesterday, true today, and true forever—that “all men are created equal, that they are endowed by their Creator with certain unalienable rights, and that among these are life, liberty and the pursuit of happiness.”

What followed was as inevitable as a decree of fate, although to the courtiers of the old world, its nobles and its kings, the revolt of the new world seemed like a dislocation of the order of nature. To them, in their blindness, “the world was all so suddenly changed, so much that was vigorous was sunk decrepit, so much that was not was beginning to be. Borne over the Atlantic to the closing ear of Louis, king by the grace of God, what sounds were these, new in our centuries? Boston harbor was black with unexpected tea. Behold a Pennsylvanian congress gather; and ere long on Bunker Hill democracy, announcing in rifle volleys, death-winged, under her star banner, that she was born, and would envelop the whole world.” In truth, nothing in the evolution of the material world is more orderly than the evolution in history of the American Revolution and the American Union. They were the natural and inevitable results of the memories, the sufferings, the faith, and the aspirations of the early settlers. The British Crown lost its American colonies not because of the stamp act, or the tax on tea, not because of the cynical statesmanship of Lord North or the immeasurable stupidity and stubbornness of the King. The future of the colonies was determined beyond recall when Luther defied the papal tyranny at Worms; when Egmont and

Horn were beheaded at Brussels; when Hampden was mortally wounded on Chalgrove Field; when the Huguenots were massacred because they would not renounce their faith; when Lord Baltimore was persecuted for being a Catholic, and William Penn was persecuted for being a Quaker. The American colonists had been consecrated, in the eternal counsels, to the old, undying struggle for civil and religious freedom and were now giving the breath of life and the spirit of liberty to the new nation which was growing, day by day, into shape and strength under the imposition of their hands. As early as the year 1765, when John Marshall was only ten years old, the citizens of the county of Westmoreland, where his father had been born, wrote and signed a declaration setting forth the rights of the colonies. Before he was ten years older he had assisted in forming a company of volunteers to defend those rights by arms, of which company he was appointed a lieutenant; and then began the first labors of his life, labors which were destined to fill in fullest measure every obligation of a patriotic citizen, first as soldier, then as statesman, and last, and crowning all with illustrious and unfading renown, as jurist.

His career as a soldier, like all the other actions of his life, was of the most creditable character. It is quite true, as Gibbon says, that "mere physical courage, because it is such a universal possession, is not a badge of excellence, but he who does not possess it is sure to encounter the just contempt of his fellows."

In the year 1775, when he was not twenty years old, he walked ten miles from his father's house to an appointed muster field. "He was about six feet in height, straight

and rather slender, with eyes dark to blackness, beaming with intelligence and good nature. He wore a plain blue hunting shirt and trousers of the same material, fringed with white, and a round black hat with a bucktail for a cockade." When the company had assembled he told them he had come "to meet them as fellow-soldiers who were likely to be called on to defend their country and their rights and liberties invaded by the British Crown; that soldiers were called for, and that it was time to brighten up their fire-arms and learn to use them in the field." It was thus early, in the first flush of his youthful vigor, with hope on his brow and love of country and of liberty in his heart, that he stepped across the threshold which divides youth from manhood, and began that almost unexampled career of public service which continued, with ever-increasing lustre, for sixty years, and ended only with his life.

Active military duty was soon offered him, and he doubtless accepted it with that joy of expected battle which is the common heritage of all the fighting races, and which only needs a just cause, like our Revolutionary struggle, to justify and sanctify it; but for its justification and sanctity such a cause it always, and in all quarters of the world, imperatively needs. Lieutenant Marshall was soon promoted to a captaincy, and it was on the field of Brandywine, a pastoral scene then and now as beautiful as the eye ever rested on, where Lafayette first shed his blood and Wayne won his first laurels, that John Marshall fought his first battle. He also bore an honorable part at Germantown; but it was only when the army retired to winter quarters in December 1777 and he was appointed to act as deputy judge advocate that he came into personal relations with

Washington, and began to secure that large measure of confidence and regard which thereafter steadily increased to the close of Washington's life.

The winter of 1777-1778 was one of the decisive epochs in the history of mankind. Washington commanded but a small army, often in need of food, always in need of clothing, never with adequate shelter against the bitter cold, never properly armed; but those soldiers found food and clothing and shelter and arms in the sacred fire of liberty, which burned brightly in all breasts. Their awful and appalling sufferings and sacrifices were irradiated with

"A light which never was on sea or land,"

enabling them to forecast the future and to behold, as in prophetic vision, their country taking her place among the independent nations of the earth as the result of their courage and fidelity. The words of Aristotle, which come to us across the centuries, are true of every soldier there, from the commander-in-chief to the private in the ranks: "Beauty of character shines thoroughly when one is seen bearing with patience a load of calamity, not through insensibility, but through nobleness and greatness of heart."

That was indeed a time which "tried men's souls" and tried, almost to the point of breaking, the great heart of him who bore alone the responsibility, which he could not share with any other, for the success of the war, and the maintaining of that independence which had been so bravely proclaimed. We now know something of the fortitude Washington displayed in that long and trying winter, and while we never can enter into the bitterness of soul he must have experienced from the cabals he discovered, the

ingratitude he ignored, the calumny he withstood, the sufferings he could not prevent, we are sure he often rose to the true appreciation of the great work he was doing for us and for all men; and pacing his lonely chamber when all the camp around him was wrapped in silence and in slumber "save where on some rampart a ragged sentinel, crunching the crisp snow with bleeding feet, kept watch for liberty," he must have known it was ordained that "the gates of Hell should not prevail" against him, for that was the Continental army and those were the hills of Valley Forge.

Mr. Burke tells us how an angel, lifting the curtain which hid the future from the gaze of the youthful Lord Bathurst, might have said to him, "Young man, there is America, which at this day serves for little more than to amuse you with stories of savage men and uncouth manners, yet shall before you taste death, show itself equal to the whole of that commerce which now attracts the envy of the world; and whatever England has been growing to in seventeen hundred years, you shall see as much added by America in the course of a single life."

As two Virginian youths lay sleeping in their huts that winter at Valley Forge I wonder if any such forecast of their country's future, or any forecast of their own, came to them in their dreams. Of these youths one was John Marshall, who was destined to lay broad and deep the foundations of his country's greatness, and thereby assist to secure the glory and the blessings of free institutions to untold generations of men; and the other was James Monroe, who was destined to proclaim the truth that this whole American continent, from end to end, and from sea to sea, must be regarded by all other nations as dedicated to lib-

erty and to bequeath to us the duty of giving practical and complete effect to the noble and inspiring doctrine which bears his name.

From Valley Forge John Marshall followed the varying fortunes of Washington's command through the year 1778 and on June sixteenth, 1779, he was with General Wayne in the assault and capture of Stony Point, an achievement which Charles Lee declared was "the most brilliant in the whole course of the war."

Immediately after the surrender at Yorktown Mr. Marshall's career as statesman began, for he had been previously elected a member of the General Assembly of Virginia, and his labors in peace were governed by the same object which inspired him as a soldier—that of moulding the colonies into one great and strong republic. His experience in the army of the evils attendant upon a divided authority, had convinced him of the necessity of one general government over all the States, possessing ample authority to insure the general safety, to promote the general welfare, and to perpetuate in peace the blessings of liberty secured by the war. He says he had imbibed these sentiments so thoroughly that they became a part of his being, and as in the army he was associated "with brave men from different States who were risking life fighting in a common cause believed by them to be most precious, I was in the habit of considering America as my country and Congress as my government." From that habit he never departed to the last hour of his life.

The brilliancy, the wisdom, and the enduring value of his contributions to the welfare of his country as Chief Justice have naturally diverted attention from his valu-

able and fruitful labors as a statesman, but those labors ought never to be forgotten, as they help to exhibit in its true proportions that consistency of opinion which made him, from first to last, such a powerful factor on the side of liberty and Union. He was re-elected to the State legislature in 1784 and again in 1787, and in the following year he was chosen a member of the convention called to reject or to ratify the Constitution of the United States. This last election clearly resulted from his personal popularity, as not only the State of Virginia, but also the county of Henrico, which elected him, was opposed to the adoption of the Constitution. He had always been the earnest advocate of its adoption, and he was "eminently fitted by his character and temper to secure without solicitation, and to retain without artifice, the public esteem. His placid and genial disposition, his singular modesty, his generous heart, his kindly and unpretentious manners, the scrupulous respect he showed for the feelings of others, his freedom from pride and affectation, his candor, and his integrity, conciliated the confidence and fixed the regard of his fellow-men."

The convention, in which he was to display these qualities for the advantage of his country, met at Richmond the second day of June, 1788, and presented an assemblage of men rarely if ever surpassed in the qualities most honored in deliberative assemblies, the qualities of eloquence, experience, and character. Among its members were Patrick Henry and George Mason, Edmund Pendleton and James Madison, Edmund Randolph, George Nicholas, and Henry Lee. It was in such company that John Marshall, by the massive strength of his great arguments on behalf of the

Union and the Constitution, succeeded in securing victory for them while extorting from his earnest and eloquent opponents extraordinary tributes of respect and regard.

Mr. Marshall was, throughout Washington's administration, its thorough and earnest supporter, and notwithstanding the almost universal unpopularity of the treaty Mr. Jay had negotiated with England, Mr. Marshall fearlessly advocated its ratification, demolishing, once for all, in a profound legal argument before the people of Richmond, the proposition that the Constitution, in giving Congress the power to regulate commerce, denied to the President the right to negotiate a commercial treaty. He was again elected to the General Assembly in 1795, and on the thirty-first day of May, 1797, was appointed one of the three special envoys President Adams was sending to France in the hope of preserving peace with that country, while maintaining the dignity and honor of his own. The sordid nature of the negotiations of the Directory, conducted through Talleyrand and his agents, was fully exposed, when it was shamelessly declared by them that to maintain peace it was "necessary to pay money—a great deal of money," and to this demand the true American answer was given at the banquet tendered Mr. Marshall on his return from his mission by members of the Congress then sitting at Philadelphia:

"Millions for defense, but not a cent for tribute."

His bearing through all the painful and disagreeable experiences of this mission justified the message Patrick Henry sent him: "Tell Marshall I love him because he acted as a republican and as an American." Those were

indeed the two guiding and controlling convictions of his whole life—he was always an ardent republican and he was always an ardent American; and his masterly conduct of the negotiations with the Directory is another striking instance of the truth that, since this country became a nation, no other country has been as wisely and successfully served by its diplomatic representatives as the United States. Of Mr. Marshall's conduct of those negotiations President Adams declared: "It ought to be marked by the most decided approbation of the public. He has raised the American people in their own esteem; and if the influence of truth and justice, reason and argument, is not lost in Europe, he has raised the consideration of the United States in that quarter."

Mr. Marshall's next public service was as a member of the last Congress which sat in Philadelphia, meeting in December, 1799, and which body, so competent a judge as Horace Binney has declared, "was perhaps never excelled in the number of its accomplished debaters or in the spirit for which they contended for the prize of the public approbation." In announcing the death of Washington, Mr. Marshall seems to have anticipated in some degree the doctrine afterwards associated with the name of President Monroe. He declared that "Washington was the hero, the patriot, and the sage of America, and that more than any other agency he had contributed to found this wide-spreading Empire, and to give to the Western World independence and freedom."

However improbable such an occurrence may now appear, it is undoubtedly true that Mr. Marshall changed the current of opinion upon a grave constitutional question by

a speech in Congress, although it is true that his argument in the Robbins case so far from being an ordinary speech in debate has all the merit and nearly all the weight of a judicial decision. It separates the executive from the judicial power by a line so distinct and a discrimination so wise that all men can understand and approve it. He demonstrated that, under the circumstances, the surrender of Robbins to the British authorities was an act of political power, which belonged to the executive department alone; and before the session closed he was privileged to teach his associates as well as his successors in Congress, by a striking example, how, when the convictions of the individual conscience conflict with the behests of party, a true patriot will follow the former, in utter disregard of party discipline, and of possible calamitous consequences to his future political advancement. Although a strong supporter of President Adams' administration, Mr. Marshall voted without hesitation, contrary to the earnest desire of the President and in direct opposition to all those with whom he was in general political accord. Believing that the second section of "The Alien and Sedition Laws" ought to be repealed, he voted accordingly, and it has long since been universally acknowledged that he was right. Among other lessons he had learned from Washington was this: "The spirit of party unfortunately is inseparable from our nature, having its root in the strongest passions of the human spirit, but in governments of the popular form it is seen in its greatest rankness and is truly their worst enemy."

So far from Mr. Marshall's independence of party having estranged President Adams he very soon afterwards appointed him Secretary of State, and the duties of this

important office he discharged with the same wisdom and firmness he had displayed in all other public stations. The right then asserted by both France and Great Britain, while at war with each other, to interfere in our affairs and to compel us to ally ourselves with the one or the other of the combatants, was denied in a dispatch which will always hold high rank among the important state papers of America. He said: "The United States do not hold themselves in any degree responsible to France or to Great Britain for their negotiations with one or the other of those powers. The aggressions sometimes of the one and sometimes of the other have forced us to contemplate and prepare for war. We have repelled, and will continue to repel, injuries not doubtful in their nature and hostilities not to be misunderstood." With this clear and vigorous statement of the true position of his country he closed his career as a statesman.

He must have found that career singularly interesting and fruitful. In the legislature of his native State; in its constitutional convention; in the special mission to the French Directory; as a member of Congress, and as Secretary of State, he had been brought into association with almost every member of that great galaxy of statesmen to whose wisdom, integrity and patriotism we are indebted for the priceless blessings of liberty and union which we now enjoy, and those associations had undoubtedly broadened and widened and deepened his opinion of the true character of the National Government, and assisted to give to his judgments that stately impress, alike of consistency and of conclusiveness, which they maintained to the end.

On the fourth day of February 1801, just a hundred years

ago, he took his seat as Chief Justice of the Supreme Court of the United States. Soldier he had been and statesman, and now for the rest of his life he was dedicated to the administration of the law. Fortunately he came to this great office, which is among the greatest possible to be held by man, in the full maturity of his intellectual powers, and admirably equipped to meet every demand which might be made upon him. He was first of all a thorough lawyer, thoroughly well grounded in legal principles, and thoroughly familiar with the decisions of the courts in England and at home, and possessed of the incalculable advantage of having tried and argued many unimportant, as well as many important causes; for he had been engaged in active, laborious, and miscellaneous practice at the bar for twenty years. His public duties, with the one exception of his brief special mission to France, had not withdrawn him from the scene of his professional labors, or seriously interfered with his devotion to them. He had risen rapidly at the bar, for the legal questions then to be discussed were novel in their character and counsel in the argument of such causes were obliged to reason from general principles and seek to apply considerations of abstract justice, so that the needs of the time and the character of his mind were in most happy accord. He had enjoyed the advantage of practicing for several years at the bar of Fauquier county and in the adjacent counties, where he had acquired not only a considerable practice, but also that familiarity with the different branches of the law and their practical application which is far more slowly and far less easily attained in a city. When, therefore, he removed to Richmond it is not surprising that he rapidly advanced to the position of the acknowledged

leader of its bar. The secret of his success was explained by Mr. Wirt: "This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of the orator, deserves to be considered one of the most eloquent men in the world, if eloquence may be said to consist in seizing the attention with irresistible force and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intends. He possesses one original and almost supernatural faculty, the faculty of developing a subject by a glance of his mind and detecting at once the very point on which every controversy depends."

The services of such an advocate were sure to be in great request, and the Duc de Liancourt, in his "Travels in America," speaks of him as being "the most esteemed and celebrated counselor" at the Richmond bar; and it was from his acknowledged leadership of that bar that he was appointed to be Chief Justice of the United States.

I have dwelt upon these steps of his advance from his admission to the bar in 1781 to his national reputation as an eminent lawyer in 1801, because it has always seemed to me there was danger of overlooking his rank at the bar, at the time of his appointment, because of the inestimable value of his services on the bench where for more than thirty years he proclaimed and established the true canons of construction to be applied to the Constitution.

It is hardly possible for us at the beginning of the century just opening to appreciate the difficulties and the dangers which confronted the nation at the beginning of the century which has just closed. We are now secure of

citizenship in a great, powerful and free nation, whose authority upon all questions affecting the national welfare is subject only to such constitutional limitations as the sovereign people have imposed. We are, in very sober truth, rich in resources beyond the dreams of any visionary, with all the material blessings the heart of man can desire, clad in full panoply for peace or war, and enjoying a moral leadership of all the nations of this vast and undeveloped continent, which is destined soon to be the home of hundreds of millions of people of all creeds and of all races, blended and fused into a peaceful confederacy of American republics. How different was the outlook a hundred years ago! A small and scattered population was then slowly making its way from the Atlantic coast into the wilderness of the valley of the Ohio, and thereby separating itself by the almost impassable barrier of the Alleghanies from the settlements on the seaboard. The Constitution, as well as the Government created by it, was only twelve years old, and in that brief period eleven amendments of its provisions had been found to be necessary. A general distrust existed of its wisdom, and in many States there was an active and bitter hostility to it, magnifying its few imperfections and denying its manifold and transcendent merits. Party spirit, then as ever since our greatest peril, exulted in the prospect that it would soon be apparent that the Constitution was incapable of solving the almost insoluble problem, of reconciling the rights of thirteen self-governing and independent communities, each differing in many respects from every other, with such sovereignty in the General Government as was indispensable to the perpetuity of the free institutions con-

fided by the fathers to its sheltering care, in those noble and memorable words graven by them, as with a pen of iron, over the entrance to the sources of the fundamental law, and which cannot be too often repeated, in which they declared that the Constitution was "ordained to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."

The new nation stood at a parting of the ways, divided as in twain by two great contentions, each supported by names of imposing weight and authority, one party insisting that the National Government was a sovereign nation created by the people of the United States and subject as such sovereign nation only to the limitations of the Constitution,—limitations which the people had imposed and which they alone could alter or remove. The other party insisted that the National Government was merely the accredited agent of thirteen independent sovereignties, which had delegated to such agent certain strictly defined powers which the States were at liberty to abrogate or withdraw, at their own good will and pleasure.

It is now universally realized that the decision of the question thus distinctly put in issue was one of the most important ever submitted to human judgment; and if it is regarded as an accident that at such a crisis in the history of free institutions John Marshall was chosen to be Chief Justice of the Supreme Court of the United States, then chance was as wise and far-seeing as any divine guidance of the nation could have been. It is true that it was an era of great statesmen and of great lawyers, broad-

minded, high-hearted men, true patriots if ever such there were. We know them now possibly better than if we had lived with them, as we linger lovingly and proudly over the minutest details of their daily lives, but we know that among them all the fittest man for the great and enduring work then needing to be done was the man who was summoned to do it. Mr. Webster wrote of him years afterwards, "I have never seen a man of whose intellect I have a higher opinion," and his intellect never served him to better purpose than when he declared the wise and moderate doctrine that the Constitution should not have either a strict or a liberal construction, but one giving the natural and ordinary effect to its words. He said: "The intention of the instrument must prevail. This intention must be gathered from its words. Its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended, and those provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them, nor contemplated by its framers."

To those memorable words are to be added these others equally memorable: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true"; and these declarations guided him, as with beacon lights, through his entire judicial career. Of these propositions no criticism could really be offered, nor from them was any appeal to either passion or prejudice possible. They enabled the Chief Justice to rear upon them that enduring structure of the true meaning of the Constitution which is among the most priceless possessions of our inheritance, and which will enable coming

generations to enjoy our privilege of living under a government of liberty regulated by law.

Soon after Mr. Marshall's entrance upon the duties of Chief Justice the Supreme Court was confronted with one of the most important questions ever submitted to any tribunal for decision: Was the extent and scope of the limitations the Constitution imposed upon the authority of the legislative department of the Government of the United States to be determined by its judicial department? Might the latter declare null and void, as in conflict with such limitations, a law deliberately enacted by the former? Many strong reasons existed for supposing this could not have been intended. One was because all legislative authority was expressly vested in Congress. Another was because the members of Congress represented the people and held direct and explicit mandates from them, renewed at briefly recurring intervals, to enact such laws as they judged to be wise and necessary. On the contrary, the justices of the Supreme Court were the nominees of the President, and enjoyed tenure of office during their lives. The assertion that the latter were at liberty to annul and set aside the legislation enacted by the former seemed to many ardent and sincere patriots a proposition destructive of the division of the powers of the government into three departments of co-ordinate dignity and authority. But listen to the calm and resistless strength with which the Chief Justice established on impregnable foundations the true doctrine: "The question whether an act repugnant to the Constitution can become a law of the land is a question deeply interesting to the United States but happily not of an intricacy proportioned to its interest. If an act of the legislature repugnant to

the Constitution is void, does it notwithstanding its invalidity bind the courts and oblige them to give it effect? Or in other words, though it be not a law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory and would seem at first an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the Constitution, if both the law and Constitution apply to a particular case, so that the court must either decide that case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the court must determine which of these conflicting rules governs the case. That is of the very essence of judicial duty. If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

In deciding that the judicial authority of the court extended to the issuing of process to the President he settled for all time the subjection of the head of the executive department to the law; and he effectually disposed of the argument that as the King of Great Britain was not subject to such process the President of the United States ought not to be, by saying:

"Of the many points of difference which exist between the first magistrate of England and the first magistrate of the United States, in respect to the personal dignity con-

ferred on them by the Constitutions of their respective nations, the court will only select two. It is a principle of the English Constitution that the King can do no wrong; that no blame can be imputed to him; that he cannot be named in debate. By the Constitution of the United States the President as well as every other officer of the Government may be impeached and may be removed from office for high crimes and misdemeanors. By the Constitution of Great Britain the crown is hereditary and the monarch can never be a subject. By the Constitution of the United States the President is elected from the mass of the people and on the expiration of the time for which he is elected, he returns to the mass of the people again."

By a course of reasoning equally irresistible he subjected the lawfulness of the ministerial acts of members of the Cabinet to the decision of the courts: "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to secure this high appellation if the laws furnish no remedy for the violation of a vested legal right. The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is accountable to his country in his political character and to his own conscience. To aid him in the performance of those duties he is authorized to appoint certain Cabinet officers, and so long as the subjects of their action are political, there exists no power to control their discretion, which is the discretion of the President.

But when Congress imposes upon a Cabinet officer other duties and directs him to perform certain acts, when the rights of individuals are dependent on the performance of those acts, he is so far the officer of the law; is amenable to the law for his conduct; and cannot at his discretion sport away the vested rights of others."

Mr. Justice Story tells us that these epoch-making judgments were "the results of his own unassisted meditations." They established upon a basis which can never be successfully assailed that both the legislative and executive departments were subject to the law, which is the only enduring basis of government in the democratic ages. If the law could lay no restraining hand upon Congress, Congress would be a despotism. If the law could lay no restraining hand upon the President and the members of his Cabinet, they would be despots. It is because neither the President nor Congress, nor the highest nor the humblest citizen of the land, is either above the restraints, or beneath the protection, of the law that ours is destined to be the final form of government, as notwithstanding all its defects, it is by far the best form of government under which men have ever been permitted to live. For of law in its widest sense, including the processes of evolution, not only in the material universe, but in the moral and spiritual universe as well, the familiar words of Hooker are always true: "There can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power."

The other labors of Chief Justice Marshall, in giving

definite form and meaning to the provisions of the Constitution, were only comparatively less difficult and important; and we must not lessen our gratitude to him by failing to appreciate the gravity of those decisions and their steadily increasing influence in our national life. "We admit," he said, "as all must admit, that the powers of the Government are limited and are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means, by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Having settled the undoubted right of Congress to determine, in its unfettered discretion, what means were necessary to give effect to the powers the Constitution conferred upon it, he next addressed himself to securing for the means thus employed absolute freedom from interference by the authority of any State. He said that while there was no express provision on the subject the proposition rested "on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. If the States may tax one instrument employed by the General Government they may tax all the means employed by it, to an excess which would defeat all the ends

of government. This was not intended by the American people. They did not design to make their Government dependent on the States. The question is indeed a question of supremacy. The court has bestowed on the subject its most deliberate consideration. The result is a conviction that the States have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operation of the constitutional laws, enacted by Congress, to carry into execution the powers vested in the General Government. This is, we think, the inevitable consequence of that supremacy which the Constitution has declared."

His next great step forward was to withdraw the obligations of contracts from the power of the State legislatures to impair their validity, and to place them also beneath the protecting ægis of the Constitution. He said: "This court can be insensible neither to the magnitude nor to the delicacy of this question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of a State is to be revised. But the American people have said, in the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts. In the same instrument they have also said that the judicial power shall extend to all cases, in law and equity, arising under the Constitution. On the judges of this court is imposed the solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink."

It is now recognized that one of his greatest services to his country was in withstanding a wave of great popular ex-

citement, shared and fostered by President Jefferson himself, and declaring the true doctrine of the Constitution to be, that no man can be convicted of treason against the United States unless he is proven by the testimony of two witnesses, to the same overt act, of levying war against the nation, or of adhering to its enemies. In discharging this grave duty he recognized fully the obloquy to which he was exposing himself. "No man," he said, "is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

In the years to come it will probably be recognized that among his decisions none will surpass in permanent material advantage that decision which determined that the power to regulate commerce resided exclusively in Congress and must be kept inviolate from any intrusion by the States, under any guise whatsoever. He refused to admit that any rights possessed by the States may be used so as to obstruct the free course of a power given to Congress. "We cannot admit," he said, "it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering

powers of the general and state governments as a vital principle of perpetual obligation. No power of legislation in the States can be allowed to restrain or interfere with any law which Congress may constitutionally pass,—it cannot interfere with any regulation of commerce.”

I have felt it was due to this great jurist to allow him to state his conclusions, as expounder of the Constitution, in his own clear and persuasive language. For more than half a century the principles vindicated by him in these decisions “have borne the keen scrutiny of an enlightened profession and the sharp criticism of able statesmen, but they remain unshaken. All the judges who concurred in them have descended long since into honored graves, but these judgments endure, and gathering vigor from time and general consent” have acquired the force of constitutional sanctions. It is not too much to say that he found his country drifting rudderless without chart or compass, and he left it with its course as definite and certain as that of the fixed stars in their courses, and invested with all the sovereign powers necessary to a great nation.

In these historic and enduring labors let us never forget that the court consisting of himself and his able, learned, and patriotic associates enjoyed the assistance of a bar of unusual eloquence and ability. As we recall them our minds are filled with admiration of their great intellectual powers and of their absolute fidelity to the court, which it was at once their privilege and their duty to advise and to instruct. In those arduous labors of evolving, year by year, the true strength and grandeur of the Constitution we must never forget the part borne by the bar,—among others by Wirt, and Dallas and Dexter, by Pinckney and Ogden

and Mason, by Binney and Sergeant, by Livingston and Wheaton, by Martin and Rodney and Rawle, by Taney and by Webster; and the reciprocal confidence, regard, and affection which existed between the bench and the bar in those memorable years of our judicial history should never be forgotten. It was only such an atmosphere which could have emboldened Mr. Wirt to indulge in flights of imagination when addressing the judges; and it was not only with courteous attention but with an entire appreciation of their beauty that the court listened to him when during the trial of Burr he described, in his vivid imagery, the startling change in the nature of Blennerhassett from his not permitting the winds of summer to visit his wife too roughly to allowing her "to shiver at midnight on the banks of the Ohio, and mingle her tears with the torrents that froze as they fell."

The Chief Justice has himself told us of the enjoyment of the court of Mr. Pinckney's argument in the case of the *Nereide*: "With a pencil dipped in the most vivid colors and guided by the hand of a master, a splendid portrait has been drawn of a single figure, composed of the most discordant materials of peace and war. The skill of the artist was exquisite—the garb in which the figure was presented was dazzling."

During Mr. Webster's argument on behalf of Dartmouth College he faltered and said: "It is, as I have said, a small college—and yet there are those who love it;" and here the feelings which he had thus far succeeded in keeping down broke forth. Every one saw it was wholly unpremeditated—a pressure on his heart which sought relief in tears. "The court-room during those two or three minutes pre-

sented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure, bent over as if to catch the slightest whisper. Mr. Justice Washington also leaned forward with an eager, troubled look, and the remainder of the court pressed as it were towards a single point."

It is quite apparent, from these instances, that the conception of Chief Justice Marshall of the dignity of his great office in no manner interfered with his appreciation of the assistance to be derived from the arguments of counsel, or of his enjoyment of their eloquence. His own lofty standard of the judicial character was, however, never relaxed. In the closing years of his life, as a member of the convention called to revise the constitution of his native State, he said: "I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary. Our ancestors thought so, we thought so until very lately, and I trust the vote of this day will show we think so still, and that we will not draw down this curse upon Virginia."

Let us fervently hope no such curse may ever be drawn down upon the United States. In a popular government like ours resting upon manhood suffrage, the forces of the reserve in the army of civilization must always be the judicial tribunals. It is upon them as our only refuge in the days of evil fortune that our rights to property, to liberty, and to life must in the last resort depend, and as long as the plain people have undiminished confidence in the integrity and impartiality of their judges, those rights will be secure, but no longer.

Shortly before his death, in reply to an address from the

bar of Philadelphia, declaring that he had "illuminated the jurisprudence of his country and enforced with equal mildness and firmness its constitutional authority," the Chief Justice replied, with his unvarying modesty, that "if he might be permitted to claim for himself any part of their approval, it would be that he had never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required"—thus firmly maintaining to the end the two guiding principles with which he began his judicial career.

And now at last the long and spotless record of labor, of honor, and of life was completed, and in Philadelphia, on the sixth day of July, 1835, John Marshall entered into rest: It is impossible to describe the impression which his death produced. It was not that feeling which the death of a public man in an ordinary sense of the word produces, which stirred the hearts of the people,—“it was a better, a purer and more tranquil sentiment,”—a mingled feeling of gratitude for the past and of security for the future.

The bar of Richmond has left an enduring record of their appreciation of him, and of their veneration for him, which seems to me the best portrait of a perfect judge ever drawn. They declared that he was “never absent from the bench in term time even for a day; that he displayed such indulgence to counsel and suitors that everybody’s convenience was consulted but his own; that he possessed a dignity sustained without effort, and apparently without care to sustain it, to which all men were solicitous to pay due respect; that he showed such equanimity, such dignity of temper, such amenity of manners that no member of the bar, no officer of the court, no juror, no witness, no suitor, in any single

instance, ever found or imagined, in anything said, or done, or omitted by him, the slightest cause of offense." They added that "his private life was worthy of the exalted character he sustained in public station, and that the spotless purity of his morals, his social, gentle, cheerful disposition, his habitual self-denial and his boundless generosity towards others, caused him to be, highly as he was respected, yet more beloved."

He had indeed completed the circle of a good man's duty as husband and father, as citizen and soldier, as statesman and jurist; and he has left to all the coming generations of his countrymen an inspiring example of a happy union of wisdom and virtue and patriotism. Two generations of American citizens have come and gone since the nation stood by his open grave, and if we have not profited as we ought to have done by the lessons of his life, we have not wholly failed to realize the lofty ideals he cherished for us. We are in a far greater degree than he foresaw a powerful, prosperous and united people, loyally accepting his construction of the fundamental law as the source of the national life and still venerating the Constitution in his own measured words, as "a sacred instrument;" and we have lived to see diffused through all sections of our country and among all classes of our countrymen such generous measures of political equality, of social freedom, and of physical comfort and well-being as were never dreamed of on the earth before.

But while our hearts are full of gratitude for these unexampled material blessings, let us, on this day of all days, when the memories of the fathers cluster so closely about us, acknowledge, as they always acknowledged, that na-

tions cannot live by bread alone. It was because of such conviction that they cherished, and we have heretofore cherished, the Christian ideal of true national greatness; and our fidelity to that ideal, however imperfect it has been, entitled us in some measure to the divine blessing, for having offered an example to the world for more than an entire generation of how a nation could marvelously increase in wealth and strength and all material prosperity while living in peace with all mankind. And although many good and thoughtful people are just now greatly troubled at what seems to them an evil promise of the future, we must never for a moment, in dark days or in bright, despair of the republic. Differences of opinion may well exist as to the best methods of discharging the grave and serious duties unexpectedly devolved upon us by a war begun with the noble object of helping a struggling people to secure their independence; but let us trust that however we may differ as to methods we all believe that the true glory of America and her true mission in the new century, as in the old, is what a great prelate of the Catholic Church has recently declared it to be: to stand fast by Christ and his gospel; to cultivate not the Moslem virtues of war, of slaughter, of rapine, and of conquest, but the Christian virtues of self-denial and kindness and brotherly love, and that it is our mission, not to harm but to help to a better life every fellow-creature of whatever color and however weak or lowly; and then we may some day hear the benediction: "Inasmuch as ye did it to one of the least of these my brethren ye did it unto me."

The passing years bring with them great compensations,

and among them is a serenity of judgment which enables us to recognize as literal practical truth that, however we may strive to persuade ourselves to the contrary, no nation ever has gathered or ever will gather grapes of thorns or figs from thistles; and, as the sense of separation of the world in which we are from the world whither we are going lessens day by day, we come at last to believe with a faith which never can be shaken that the true mission of nations as of men is to promote righteousness on earth; that conferring liberty is wiser than making gain; that new friends are better for us than new markets; that love is more elevating than hatred; that peace is nobler than war; that the humblest human life is sacred; that the humblest human right should be respected; and it is only by recognizing these truths, which can never fail to be true, that our own beloved country can worthily discharge the sacred mission confided to her and maintain her true dignity and grandeur, setting her feet upon the shining pathway which leads to the sunlit summits of the olive mountains and taking abundant care that every human creature beneath her starry flag, of every color and condition, is as secure of liberty, of justice and of peace as in the Republic of God.

In cherishing these aspirations and in striving to realize them, we are wholly in the spirit of the great Chief Justice; and we can in no other way so effectually honor his memory as by laboring in season and out of season to make this whole continent of America "one vast and splendid monument, not of oppression and terror, but of wisdom, of peace and of liberty, on which men may gaze with admiration forever."

